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CASE NO.: _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

JOSE DELFIN MULE-VASQUEZ,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari
to the United States Court of Appeals
for the Eleventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

I. WHETHER THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES AN IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT, THE PRECEDENT OF OTHER FEDERAL COURTS AND OF THE COURT BELOW, BY SIGNIFYING THE END OF THE TIME HONORED MERE PRESENCE RULE, THE FIRMLY ENTRENCHED RULES OF PRESUMPTION OF INNOCENCE, AND THE STANDARD REQUIRED OF THE GOVERNMENT TO PROVE AN ACCUSED GUILTY BEYOND EVERY REASONABLE DOUBT.

II. THE DECISION BELOW CREATES IRRECONCILABLE CONFLICTS WITH VARIOUS CIRCUIT DECISIONS AND DECISIONS OF THE UNITED STATES SUPREME COURT INCLUDING United States V. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Reyes 595 F.2d 275 (5th Cir. 1979); and United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).

PARTIES TO THE PROCEEDING IN THE COURT BELOW

United States of America
Alberto Lopez-Llerena
Feliz Parra
Jose Borges
Jose Delfin Mule Vasquez
Lazaro Cruz, Jr.
Hector Theodore Valdes
Fausto Manuel Sanchez
Raul Pinera
Carlos Olivera-Chirino
Jose Luis Marino

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED FOR REVIEW.....	i
PARTIES TO PROCEEDING IN COURTS BELOW.....	i
OPINION BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.....	2
STATEMENT OF THE CASE.....	3
REASON FOR GRANTING THE WRIT.....	8
CONCLUSION.....	29
CERTIFICATE OF SERVICE.....	30
APPENDIX.....	
A. Lower Court Opinion.....	A-1
B. Order Denying Petition for Rehearing and Rehearing En Banc.....	B-1-B-13
C. Order Granting Extention of Time to File Petition for Certiorari.	C-1

TABLE OF AUTHORITIES

Cases	PAGE
1. Glasser v. United States, 315 U.S. 60, 62 S.Ct. 475, 86 L.Ed. 680 (1942)	27
2. United States v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982)	25, 26
3. United States v. Blasco, 702 F.2d 1313 (11th Cir. 1983)	17, 18, 26
4. United States v. DeSimone, 660 F.2d 532 (5th Cir. Unit B 1981)	23, 24
5. United States v. DiRe, 332 U.S. 581 (1948)	9
6. United States v. Escobar, 674 F.2d 477 (5th Cir. 1982)	26
7. United States v. Jackson, 700 F.2d 181 (5th Cir. 1983)	10
8. United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974)	8, 19, 20, 21, 25, 26
9. United States v. Marszalkowski, 669 F.2d 655 (11th Cir. 1982)	26
10. United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983)	9, 19, 22, 23, 26, 26, 28

11. United States v. Reyes, 595 F.2d 275 (5th Cir. 1979) 8, 19,21

12. United States v. Torres, 705 F.2d 1287 (11th Cir. 1983) 10

CONSTITUTIONAL PROVISIONS

Fifth Amendment, United States Constitution..... 2, 7

Sixth Amendment, United States Constitution..... 2

RULES

United States Supreme Court Rule 20..... 2

STATUTES

21 U.S.C. Section 846..... 2, 3
28 U.S.C. Section 1254(1)..... 2
28 U.S.C. Section 1291..... 7

The Petitioner, JOSE DELFIN MULE VASQUEZ, respectfully prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals of the Eleventh Circuit, entered in this proceeding on August 30, 1983.

OPINION BELOW

The opinion of the lower court is reported in United States v. Lopez-Llerena, 721 F.2d 311 (11th Cir. 1983), rehearing denied, 721 F.2d 311 (11th Cir. 1983), and appears in the appendix hereto (App. "A" & "B").

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit affirming the Petitioner's conviction was entered on August 30, 1983 (App. "A"). A Petition for Rehearing and Suggestion for Rehearing, En Banc was denied by the 11th Circuit on December 16, 1983 (App. "B"). On February 15, 1984, this Honorable Court

granted an extension of time to file this Petition until March 15, 1984. (App. "C"). This Petition for Certiorari was timely filed. The jurisdiction of this Court is invoked pursuant to Title 28 U.S.C. Section 1254(1), and Supreme Court Rule 20.

CONSTITIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment V:

> No person shall ... be deprived of life, liberty or property, without due process of law; ...

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury ... and to be informed of the nature and the cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Title 21, U.S.C. Section 846, Attempt and Conspiracy:

> Any person who attempts or conspires to commit any offense defined in this sub-chapter is punishable by imprisonment or a fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

The Petitioner, JOSE DELFIN MULE VASQUEZ, was arrested during the early morning hours of December 22, 1981, as a result of a law enforcement raid on two neighboring houses in a residential area in Key Largo, Florida, following an off-load of marijuana from two vessels docked behind the premises. He, together with 10 other defendants were charged in a two-count indictment with conspiracy to possess with intent to distribute marijuana, and possession with intent to distribute marijuana. Subsequently, the Petitioner was found guilty by a jury of conspiracy, but not guilty of the possession count. The same verdicts were

returned against the other 10 defendants.

The evidence at the trial showed that during the late evening and early morning hours of December 21, 1981, two customs patrol officers were conducting surveillance of two water-front homes located in a residential community of Key Largo, Florida. The residences under surveillance were along side one another and at the end of St. Thomas Street. The customs patrol officers were located across the canal from the homes that they were surveilling. From this position, they could observe the back sides of the subject homes. The backs of the homes face the canal. The agents could also observe the backyards and dock areas of the subject homes, but they were unable to see the opposite side of the street, to wit: The front side facing St. Thomas Street. This was a residential street and the agents had no knowledge or information

that evening as to the activities or persons on St. Thomas Street (TR. 204-210). The customs officers observed what appeared to be a marijuana off-load operation taking place at the dock of the subject residences. Thirteen persons were observed in the off-load operation. Two of those persons departed in the motor vessel "SUNSHINE" (TR. 208). The officers did not blockade St. Thomas Street to prevent automobiles and persons from entering and leaving the area. (TR. 206-207). Shortly after the commencement of the off-loading of the motor vessel "ODETTE", the raid was commenced and there were 11 persons observed who scattered and fled. The surveillance officers across the canal maintained their position to assist the raiding officers and direct them to the locations to where the suspects fled. None of the suspects fled by way of the canal. (TR. 380-385). One

of the officers observed the Petitioner in a tributary canal that empties into the main canal. The subject homes which were raided fronted on the main canal.

At the time of the trial, the Government did not identify the Petitioner as being the person who was present in either of the homes or either of the yards where the raids took place. The Government also failed to offer any evidence that MULE VASQUEZ knew or ever associated with any of the persons that were allegedly involved in the conspiracy with which he was charged. No evidence was introduced that MULE VASQUEZ participated in this nocturnal criminal enterprise. (TR. 483-484). The evidence demonstrated that neither of the homes where the off-loading took place, and neither of the vessels involved in the off-loading were owned by any of the Defendants. (TR. 193, 194, 147). Two

wallets were discovered at the scene containing identification, documents and cash in the approximate amount of $800.00 to $1,000.00. Neither of these wallets were the property of any of the defendants who were arrested. (TR. 669-671, 686).

Nevertheless, the petitioner was arrested, charged and convicted because of his proximity to the off-load operation. By the agent's own admission, they would have, and did, arrest anyone they found. Because 11 persons had been observed participating in the off-load, and 11 people were ultimately arrested and convicted, does not adhere to the promises of a fair trial and the guarantee of Due Process afforded by the Fifth Amendment to the United States Constitution.

The Eleventh Circuit's jurisdiction to entertain Petitioner's direct appeal was predicated upon Title 28 U.S.C., Section 1291.

REASONS FOR GRANTING THE WRIT
INTRODUCTION

The Petitioner argues the following reasons why this Petition for Writ of Certiorari should be granted:

1. The decision below presents an important question of Federal Law and creates an irreconcilable conflict with the precedent of this Court, the precedent of other Courts and of the court below, by signifying the end of the time honored mere presence rule, the firmly entrenched rules of presumption of innocence, and the standard required of the Government to prove an accused guilt beyond every reasonable doubt.

2. The decision below creates irreconcilable conflicts with various circuit decisions and decisions of the United States Supreme Court including United States v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Reyes, 595

F.2d 275 (5th Cir. 1979); and United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).

I

WHETHER THE DECISION BELOW PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW AND CREATES AN IRRECONCILABLE CONFLICT WITH THE PRECEDENT OF THIS COURT, THE PRECEDENT OF OTHER FEDERAL COURTS AND OF THE COURT BELOW, BY SIGNIFYING THE END OF THE TIME HONORED MERE PRESENCE RULE, THE FIRMLY ENTRENCHED RULES OF PRESUMPTION OF INNOCENCE, AND THE STANDARD REQUIRED OF THE GOVERNMENT TO PROVE AN ACCUSED GUILTY BEYOND EVERY REASONABLE DOUBT.

The decision of the Eleventh Circuit Court of Appeals affirming the petitioner's conviction signifies the terminal obliteration that "mere presence" at the scene of a crime without more will not sustain a conviction for conspiracy to possess marijuana. It has long been the established principle annunciated by this court in United States v. DiRe, 332 U.S.

581, 593 (1948), that mere presence is insufficient. Other courts have equally expressed themselves. In a drug conspiracy case, the Government must prove beyond a reasonable doubt that a conspiracy existed, that the accused knew of the conspiracy, and that he voluntarily joined in it. United States v. Jackson, 700 F.2d 181 (5th Cir. 1983). Prior decisions of the Court below have adhered to the mere presence doctrine. United States v. Torres, 705 F.2d 1287 (11th Cir. 1983).

The decision of the Eleventh Circuit in this case irreconcilably departs from this time honored principle that mere presence even when coupled with flight will not form the basis upon which to predicate a conviction for conspiracy to commit a crime.

In the case sub judice two vessels, the "SUNSHINE" and the "ODETTE" were

observed by police being unloaded of their marijuana cargoes during the early morning hours of December 22, 1981. The "SUNSHINE" arrived first, docked behind a house in Key Largo, Florida, and approximately an hour later after the "SUNSHINE" had departed, the "ODETTE" docked behind a house next door. (TR. 82-84, 88). It appeared to surveilling officers that 11 persons, all together, were involved in each off-load operation. The Petitioner, was not identified by any Government witness as having been involved in either off-load operation. None of the Government witnesses could identify the Petitioner as having been observed at any specific location on the 21st or the 22nd of December, 1981, prior to arrest. (TR. 418-419). No surveilling officer was able to see the faces of any of the people at the scene. They could not describe what any of the people were wearing. The indi-

viduals involved could only be seen as silhouettes. (TR. 84-85). It was not known whether the people seen were black or white. (TR. 217, 454).

There was no attempt to obtain fingerprints in this case. (TR. 124-126). Although the "SUNSHINE" was later seized in the Miami River, no evidence was presented that it was tested for latent fingerprint impressions so as to identify the people who had been on board. (TR. 156-157). No evidence was presented that any of the suspects had marijuana residue on their clothing. Apparently no attempt was made to gather such evidence. (TR. 218-222). Radio broadcast and communications related to the investigation were monitered, however, none were admitted into evidence or described by any witness. (TR. 150). No conversations or interceptions were recorded. (TR. 150).

No attempt was made to take pho-

tographs of the off-loading operation. (TR. 151, 242). No evidence was presented that the Petitioner owned either of the houses or vessels involved in this case. (TR. 193-194). Later investigation revealed that one of the houses was owned or rented by an individual uncharged in this case. (TR. 152). Papers located on the vessel "ODETTE" indicated that its owner was also a person who was not arrested. (TR. 147).

A critical deficiency in the government's case against the Petitioner involves the fact that the prosecution was based solely upon a "numbers game". All that was certain was that anyone on the premises or in the immediate area would be arrested even though the actual arresting officers had no knowledge of how many people were involved in the off-loading operation. (TR. 301-302). However, since 11 people were observed in the off-loading

operation, it was pre-destined that 11 people would be arrested and face trial.

The defect in the Government's theory of the case, however, involved not only the insufficiency of the evidence against the Petitioner, but the fact that there was evidence that guilty persons involved in the off-load operation had escaped detection while innocents were indiscriminantly arrested and charged. The undisputed evidence presented by the Government demonstrated that drug enforcement administration agent William Simpkins took possession of two wallets discovered in the first house. (TR. 668-669). The two people identified by documentation found within the wallets were not arrested. (TR. 669-671). The wallets contained various checks, bank deposit slips, documents and approximately $800.00 to $1,000.00 in cash. (TR. 686).

In addition, the Government's own evi-

dence established that one man observed during surveillance carried a machine gun type weapon described as a Uzi machine gun. (TR. 90, 371-372). None of the 11 defendants arrested in this case possessed a weapon. No weapons were found in either house. (TR. 306, 322).

In addition to the missing weapon, the two people who abandoned their wallets, money and personal possessions at the scene, and whatever unknown unobservable people remained within the premises and in the proximity of the vessels, there existed the expressed admission by the Government witnesses that more than 11 people arrested may have been involved. Prior to the raid, the roadway coming into the area was not closed. (TR. 207). Accordingly, after 11 people were apprehended, a search was nevertheless conducted of the area, because it was unknown whether or not more people were in front

of the house. (TR. 209-210). One surveilling officer expressly admitted that he could not testify whether or not any of the suspects had escaped from the area and avoided apprehension. (TR. 423).

Added to this is the fact that the Petitioner in this cause was apprehended at the edge of an adjacent canal, not the canal where the unloading operation was taking place. There was extreme difficulty in identifying the Petitioner as having been present in the area at all. It required three attempts by one of the officers. The third try, he stated that he had guessed the identification. (TR. 211). The only means by which he could identify the Petitioner in Court was that he used a photograph of MULE VASQUEZ with his name written on the back. (TR. 212). The decision of the Eleventh Circuit here mandates the precept that one's suspicious presence at the scene of a crime sustains

proof beyond a reasonable doubt of one's guilt. The Court's decision is a decided departure from established United States Supreme Court Doctrine. This decision is aggravated by the lower Court's reliance upon its prior decision in United States v. Blasco, 702 F.2d 1313 (11th Cir. 1983) cert. denied, ___ U.S. ___.

As set forth in the factual recitation in Blasco at 1320-1321:

> The Cohen Estate is bordered by water on two sides -- the southern end of the residence rests upon a canal, and the western portion of the property extends to the Spanish Harbor Channel. The remaining two sides are enclosed by a chain-link fence, and, on the night in question, the gate across the road leading to the residence was padlocked.

Moreover, the Blasco Court revealed that "the officers moved ... to ... a point from which they could see the entrance to the canal leading to the Cohen property." id. at 1321. Also, the offi-

cers involved in the Blasco raid were "instructed to shut off the possible avenues of escape". id. Finally, regarding the nature of the area involved in Blasco, the Court expressly noted: "The Cohen Estate is situated in a secluded area, the kind frequently utilized for off-loading operations." id. at 1332.

In the case at bar, the undisputed testimony of the arresting officers was that they could not preclude the possibility that someone escaped from the residences involved prior to the time the officers reached the scene from the surveillance point across the canal. (TR. 23). No officers were positioned to prevent suspects from escaping by the canals which ran along both sides of the area in question. (TR. 480). The photographic evidence introduced at trial clearly revealed that the area in which the residence were located was not private and

secluded, but rather contained dozens of nearby homes into which any suspects could have entered and hidden. In addition, the record detects numerous escape routes along hundreds of yards of seawall giving access to both canals.

Therefore, it is submitted that if the mere presence doctrine is to enjoy further viability and if this Court's precedence is to be honored, Certiorari should be granted to remedy the constitutional departure created by the Eleventh Circuit Court of Appeals in this case.

II

THE DECISION BELOW CREATES IRRECONCILABLE CONFLICTS WITH VARIOUS CIRCUIT DECISIONS AND DECISIONS OF THE UNITED STATES SUPREME COURT INCLUDING United States V. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974); United States v. Reyes 595 F.2d 275 (5th Cir. 1979); and United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983).

The decision of the former Fifth Circuit Court of Appeals in United States

v. Lopez-Ortiz, 492 F.2d 109 (5th Cir.) cert. denied, 419 U.S. 1052 (1974), is materially indistinguishable from the case at bar. There, a night-time surveillance revealed numerous people unloading large gunny sacks from a truck to the garage of a residence. A raid was conducted on the premises and the participants in the unloading operation "broke and ran". Two people were taken into custody in the immediate vicinity and Lopez-Ortiz was found hiding behind a rock wall dividing the premises from the next door property. Despite the fact that numerous gunny sacks were in plain view and the odor of marijuana was prevalent, the court reversed the defendant's conviction for conspiracy to possess marijuana with intent to distribute it since his presence and flight did not prove the offense charged. Moreover, the court's decision was not altered by its finding that the

defendant's story was impeached in at least three ways and its conclusion that these inconsistencies resulted in a jury verdict of guilty. The court, noting that the issue before it was not the credibility of the defendant's story, held:

> At best, the evidence establishes only that he was present in the area and had fled from federal officers. It does not show that he actually participated in the unloading operation, or began his flight from near the truck. Further, there was no testimony by the government agents that Lopez-Ortiz had approached and entered the house prior to the raid. Indeed, all the arresting officers could say was that they found him behind a nearby rock wall. 492 F.2d at 115.

The same conclusion should have been reached by the Eleventh Circuit Court of Appeals in this case.

The decision of the Eleventh Circuit is equally irreconcilable with the decision of the court in United States v. Reyes, 595 F.2d 275 (5th Cir. 1979). In Reyes, the defendants were found in a

small airplane from which bales of marijuana had been dropped. There was no evidence that they pushed the bales out. Their convictions were reversed since:

> there was no direct testimony that any of them did so, much less that all of them participated. Each of the defendants was entitled to have his guilt or innocence determined as an individual; the government failed to prove beyond a reasonable doubt that each defendant or any particular defendant participated ... 595 F.2d at 281 (emphasis by court).

The differentness of the court's decision in this case, and even its own internal conflict, is palpably demonstrated by its subsequent decision in United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983). This case and Pintado are remarkable for their factual similarities. Both involved Customs surveillances of houses bordering canals in the Florida Keys. Both involved marijuana off-load operations from a vessel docked behind the

premises involving numerous, unidentified people. In each case, a raid by numerous Customs officials resulted in the arrests of all the suspects they were able to find at the scene.

The conflicts inherent in the decisions of the Eleventh Circuit is further amplified by the Pintado court relying upon the Fifth Circuit decision in United States v. DeSimone, 660 F.2d 532 (5th Cir. Unit B 1981). In DeSimone, the court noted in reversing DeSimone's conviction that the evidence clearly placed him in a "suspect climate of activity". This included such things as DeSimone checking into a motel where the remainder of the alleged co-conspirators were also residing, being observed in the presence of several other defendants, and finally, being apprehended in the wee hours of the morning in the vicinity of a red Chevrolet, which had been driven into a

ditch in the area of a plane load of marijuana, and from which he had presumably fled along with other defendants in the case. The court noted in DeSimone:

> Obviously, appellants presence was highly suspicious, but this is not a substitute for evidence sufficient to prove beyond a reasonable doubt. Although it is certainly possible - even probable - that (the appellant) was involved in the conspiracy, such speculation does not constitute proof beyond a reasonable doubt, and juries "must not be permitted to convict on suspicion and innuendo."

In contrast to DeSimone, here the evidence was completely lacking as to any prior association or evidence that the defendant knew any of the other co-defendants in this case. Here, petitioner was not identified as having been involved in unloading of either of the vessels. Neither did the officers testify that the defendant left the scene of the unloading, to avoid apprehension. In this case, despite the remarkable similarities in the

three cases, the Pintado court and the DeSimone court reversed the conviction of the accused while the Lopez-Llerena affirmed. In addition, in Pintado, security lights in the rear of the house were lighted and dock lights along the canal were illuminated. In the case at bar, the off-load operation was conducted in the blackness of night - so dark, in fact, that even with a night scope, all that could be seen by the surveilling officers were silhouettes.

The decision in the Lopez-Llerena has a far more reaching effect than may appear on the surface. Here the Court has applied a recently adopted liberalized standards of the Eleventh Circuit in United States v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) for judging the sufficiency of the evidence. In Bell, the court held that a jury verdict of guilt must stand if "a reasonable trier of fact

could find that the evidence establishes guilt beyond a reasonable doubt." Thus, Bell rejected the legendary principle that a trier of fact must exclude every reasonable hypothesis of innocence. United States v. Escobar, 674 F.2d 477 (5th Cir. 1982); United States v. Marszalkowski, 669 F.2d 655 (11th Cir. 1982). The Court in Lopez-Llerena attempts to reconcile the distinctions between Pintado and Lopez-Llerena and Blasco by using the Bell rationale. Bell signifies some form of subjective test for what a "reasonable minded trier of fact" would do. It is difficult to understand how a Court of Appeals can determine whether there is a "reasonable minded trier of facts" judging the case when they do not know the trier of facts. The problems inherent in application of this standard is widened by the Pintado court applying the same standard and arriving at an opposite result from

the case at bar. This is a further dilution to the rule established by the United States Supreme Court in Glasser v. United States, 315 U.S. 60, 62 S.Ct. 475 86 L.Ed. 680 (1942) that a conviction must be supported by "substantial evidence."

If the present decision in this case is permitted to stand, it will signify the end of the firmly entrenched principles of presumption of innocence and proof of guilt beyond every reasonable doubt. It will usher in the era where an innocent person arrested in the vicinity where a crime has been committed, without more, can be convicted. It will herald that a person can be convicted of crime by "head count" only.

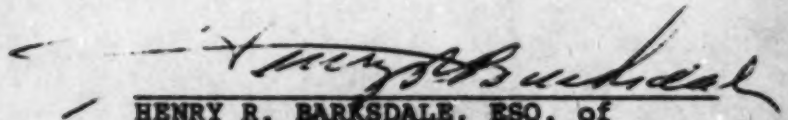
In this case, there were no fingerprints, no photographs, no evidence of the Petitioner's recent exertion, no marijuana residue, no statements, no

contraband on the Petitioner's person, no evidence of flight, and no evidence that the defendants previously knew each other. There existed here, as in Pintado, absolutely no objective facts or circumstances from which the Petitioner's knowledge of the ongoing operation could be inferred. See e.g., Pintado, supra at 1505.

The opposed conclusions reached by two panels of the Eleventh Circuit within a period of a month on the same issue and, for all intents of purposes on the same facts are irreconcilable. It is submitted that Certiorari must be granted to resolve the conflict created by the Eleventh Circuit Court of Appeals and to remedy the injustice suffered by JOSE DELFIN MULE VASQUEZ.

CONCLUSION

The case below indicates a radical departure from the substantive body of law developed by this Court as well as the Fifth Circuit Court of Appeals regarding mere presence at the scene of the crime. If allowed to stand, the case will have far reaching judicial significance. The maintenance of uniformity and the administration of criminal justice in the federal courts, particularily the Eleventh Circuit, is jeopardized by the decision below. For the reasons and authority advanced herein, the Petitioner urges this Court to grant its Writ of Certiorari in this case.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that all parties required to be served herein have been served and further certify that three copies of the foregoing Petition have been served by United States mail this 14th day of March, 1984, upon the Office of the United States Solicitor General, 10th and Constitution Avenue, N.W., Washington, D.C. 20530, and a copy upon Lurana S. Snow, Esquire, Office of the United States Attorney, 299 E. Broward Boulevard, Fort Lauderdale, Florida 33301.

HENRY R. BARKSDALE, ESQUIRE

APPENDIX A

Opinion in the Court below.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alberto LOPEZ-LLERENA, Felix Parra, Jose Borges, Jose Delfin Mule Vasquez, Lazaro Manuel Sanchez, Raul Pinera, Carlos Oliver-Chirino, and Jose Luis Marinio, Defendants-Appellants.

No. 82-5916.

United States Court of Appeals,
Eleventh Circuit.

Aug. 30, 1983

Appeals from the United States District Court for the Southern District of Florida.

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

AFFIRMED; Circuit Rule 25. See United States v. Blasco, 720 F.2d 1315 (11th Cir. 1983).

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

APPENDIX B

Order Denying Petition for Rehearing and Rehearing En Banc.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Alberto LOPEZ-LLERENA, Felix Parra, Jose Borges, Jose Delfin Mule Vasquez, Lazaro Manuel Sanchez, Raul Pinera, Carlos Oliver-Chirino, and Jose Luis Marinio, Defendants-Appellants.

No. 82-5916.

United States Court of Appeals,
Eleventh Circuit.

Dec. 16, 1983

Defendants were convicted in the United States District Court for the Southern District of Florida, Jose A. Gonzalez, Jr., J., of conspiracy to possess marijuana with intent to distribute. The Court of Appeals affirmed, slip op. p. 854, ____ F.2d ____. On petitions for rehearing, the Court of Appeals held that there was sufficient evidence beyond defendants' presence and flight to support convictions for conspiracy to possess

marijuana with intent to distribute.

Petitions denied.

Appeals from the United States District Court for the Southern District of Florida.

ON PETITIONS FOR REHEARING

(Opinion August 30, 1983, 11th Cir., 1983, slip op. p. 854, ___ F.2d ___).

Before FAY and KRAVITCH, Circuit Judges, and ATKINS*, District Judge.

PER CURIAM:

A panel of this court affirmed the appellants' convictions pursuant to Circuit Rule 25, relying on United States v. Blasco, 720 F.2d 1315 (11th Cir. 1983). The appellants have filed a petition for rehearing and a suggestion for rehearing en banc, contending that the affirmance of

*Honorable C. Clyde Atkins, U.S. District Judge for the Southern District of Florida, sitting by designation.

their convictions is in conflict with this court's subsequent decision in United States v. Pintado, 715 F.2d 1501 (11th Cir. 1983). We disagree and deny the petition for rehearing.

Like the appellants in this appeal, the defendants in Blasco and Pintado challenged the sufficiency of the evidence for their convictions under 21 U.S.C. §846 of conspiracy to possess marijuana with intent to distribute. Both Blasco and Pintado were decided on the principle that although presence and flight alone were insufficient to establish that the defendant was a member of the drug conspiracy, a reviewing court must consider the totality of the circumstances, including the facts of presence and flight, to determine "if there is substantial evidence to support [the jury verdict] when the facts are viewed in the light most favorable to the government."

United States v. Blasco, 702 F.2d at 1331-32 (quoting U.S. v. Davis, 666 F.2d 195, 201 (5th Cir. Unit B 1982))[1]; U.S. v. Pintado, at 1503. This standard of review complies with our holding in U.S. v. Bell, 678 F.2d 547 (5th Cir. Unit B 1982) (en banc), aff'd on other grounds, ___ U.S. ___, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983):

> It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of facts could find that the evidence establishes guilt beyond a reasonable doubt. A jury is free to choose among reasonable constructions of the evidence.

[1] In Blasco we found that the totality of the circumstances would have allowed a reasonably cautious jury to conclude that the appellants were involved

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[1]This circuit has adopted Unit B decisions of the former Fifth Circuit as binding precedent. Stein v. Reynolds Securities, Inc., 667 F.2d 33, 34 (11th Cir. 1982).

in a drug conspiracy. The off-loading operation had taken place early in the morning at a secluded setting, and the agents had testified to the noise of the operation and the heavy smell of marijuana. The panel found that "it strains the imagination that these appellants were not aware of the off-loading taking place on the dock outside the house," 702 F.2d at 1332, and concluded that a jury could have found beyond a reasonable doubt that the defendants were guilty. Id. Blasco thus did not overrule our prior cases in this area, but simply brought them into accord with the Bell decision.[2]

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[2]The appellants, for example, rely on U.S. v. Lopez-Ortiz, 492 F.2d 109 (5th Cir. 1974). Lopez-Ortiz, however, was decided prior to Bell and concluded that the evidence to be sufficient to convict had to "exclude every reasonable hypothesis save that of guilt, at least where, as here, there are flight that are consistent with innocence." 492 F.2d at 115. Thus the holding of Lopez-Ortiz, that mere pre-

In Pintado, a review of the totality of the circumstances led to a reversal of the defendant's conviction. Agents testified that at 1:40 a.m. "about six" persons were seen quickly and silently unloading large bundles from a boat docked behind the house. Customs officials approached in a car with lights flashing and announced "U.S. Customs." Two individuals were apprehended outside; the rest fled into the house. Three males and a female were arrested downstairs. Pintado was discovered hiding in a closet after officers forced open a locked bedroom door upstairs. A total of seven persons were arrested. Although at trial Pintado claimed that he had been sleeping during the off-loading operation and was unaware

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sence and flight is insufficient evidence to convict, still is valid, but a post-Bell court need not exclude "every reasonable hypothesis save that of guilt" to uphold the conviction.

of the events outside, he was wearing a pair of pants and a shirt when found.

This court found that the jury could have reasonably rejected the defendant's claim that he was sleeping, but that there was no other evidence besides his presence and hiding to infer that he was a member of the conspiracy. The operation had been carried out silently and the marijuana had been placed in a garage that was not visible from the room where the appellant was discovered. Several sets of damp and dirty clothing were found downstairs; the government, however, did not show the number or sizes of the clothing or in any way connect the clothes with Pintado. Furthermore, the government was unable to correlate the number of individuals arrested and indicted with the Customs official's observations of the number of people involved in the unloading process. The official estimated that "about six"

persons were involved, but admitted that he could not tell whether four, five, six, seven or some other number of individuals were actually present.[3]

[2] Unlike Pintado, a review of the totality of the circumstances in this case demonstrates that the jury could have found beyond a reasonable doubt that the appellants were involved in the drug conspiracy. Two agents, one using a star scope, observed from one hundred feet away the separate unloadings of the SUNSHINE and the ODETTE, each time counting eleven individuals forming a line to pass the bales from the boat up to the house.[4]

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[3]Futhermore, of the seven individuals arrested (six males and one female), only the six males were indicted, although "what appeared to be a female" was observed out on the seawall only four minutes prior to the raid. An additional reason thus existed to doubt that the government's estimate of "about six" off-loaders were the same six who were indicted.

[4]Because of the darkness, the agents

Around 2 a.m., law enforcement officers moved in for the arrest with sirens and lights flashing, and the eleven individuals scattered. A DEA helicopter appeared minutes later, hovering overhead with its landing lights on.

The officers observed the various individuals as they fled to several areas. The first four arrested were found hiding in a cluster of sea grapes. The officer with a star scope had watched them jump a fence and take cover. Three individuals were seen running up the outside stairs to the upper level of the house and were apprehended after a search of the house; no one else was found in the house or seen escaping. Three other appellants were arrested after being observed running towards a fence near the canal; one was

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could not identify any of the individuals involved merely through their observations of the unloading.

found swimming in the canal (although the night was very cold) and two hiding under a rock ledge. The last defendant was discovered hiding under the dock after an agent had seen him dissapear into the shadows of the ODETTE. The first arrest occurred within four minutes of the commencement of the raid; the last arrest took place approximately ten minutes later.

[3] The appellants argue that reasonable doubt existed because the officers conceded that they could not be sure that no one had escaped and because there was evidence that other individuals had been present.[5] One of the three defendants found upstairs also testified at trial

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[5]The defendants primarily rely on evidence that two wallets were found containing eight hundred to a thousand dollars which did not belong to any of the defendants, that none of the defendants owned either the boats or homes involved, and that although an individual with an

that they had been watching T.V. during the unloading, unaware of the events going on in the back yard.

Viewing the evidence as most favorable to government, Glasser v. United States, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680 (1942), we find sufficient evidence beyond the appellants' presence and flight to support the convictions. Although the officers did not testify as to the noise of the unloading or the smell of marijuana, two boats were unloaded at different times in the early hours of the morning by a human chain of eleven individuals -- circumstances that would allow a jury to reasonably infer that those pre-

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Uzi machinegun was seen patrolling, the machinegun was never found. The government, however, need not prove that other individuals were not on the grounds during the evening or were involved in the overall conspiracy (for example, providing the boats), but only that the eleven appellants who were arrested participated in the conspiracy.

sent were aware of the operation. (Furthermore, and importantly, the officers were able to testify as to where the individuals had fled in attempting to escape, and they were subsequently found and arrested in these locations.) Finally, unlike Pintado, the number of individuals observed unloading, eleven, corresponded with the number of persons found and arrested.[6]

The three individuals arrested in the upstairs room argue that their case is identical to Pintado's, who also was found hiding in an upstairs room. Yet, here, the officer saw three individuals

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[6]Unlike Pintado, the agents in this case did not estimate that "about eleven" were involved, but testified that they had counted nine individuals on shore and two persons on the ODETTE unloading before the raid. The defendants point out that at an earlier trial one of the officers had testified that "about nine" were on shore unloading a boat that had docked earlier, the SUNSHINE. Even assuming that the officer was making an estimate of those on

going upstairs and no other individuals were found in the house. We thus have a further element not present in Pintado, where an unknown number of individuals had fled into the house when the raid commenced and no one saw any of those fleeing run up the stairs to the bedroom.

The facts of this case are not identical to either Blasco or Pintado. A review of all the circumstances, however, leads us to conclude that the facts here are more akin to Blasco, as there are circumstances beyond presence and flight that provided sufficient evidence for a jury to find beyond a reasonable doubt that the appellants were part of a drug conspiracy.

The petition for rehearing is DENIED.

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shore for unloading the SUNSHINE, his testimony does not suggest that he estimated the number of persons participating in the later unloading of the ODETTE, which was the vessel that was docked when the raid occurred.

APPENDIX C

Order extending time to file Petition for Writ of Certiorari.

No. A-652

JOSE DELFIN MULE VASQUEZ,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including March 15, 1984.

/s/ LEWIS F. POWELL
Associate Justice of the Supreme Court of the United States

Dated this 15th day of February, 1984.

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